

**PUBLIC EMPLOYMENT RELATIONS COMMISSION
GENERAL COUNSEL'S SUPPLEMENTAL REPORT**

January 1 - March 17, 1997

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The Commission received one affirmance and one reversal from the Appellate Division. Two appeals were withdrawn or dismissed.

Unfair Practice Cases

A petition for certification has been denied and a notice of appeal has been dismissed in *Middletown Tp. Bd. of Ed. and Middletown Ed. Ass'n*. That case is described at pp. 1-2 of my 1996 annual report.

Scope-of-Negotiations Cases

An Appellate Division panel has affirmed *City of Hoboken and Hoboken Police Superior Officers' Ass'n*, P.E.R.C. No. 96-16, 21 *NJPER* 348 (¶26214 1995), aff'd App. Div. Dkt. No. A-1619-95T5 (2/5/97). The Commission declined to restrain arbitration over a grievance filed by a police sergeant seeking overtime compensation for duties performed as an emergency management coordinator. The employer had argued that the sergeant was not covered by the parties' recognition clause when performing those duties and that the Commission was compelled by *N.J.S.A. 34:13A-5.3* to decide the recognition clause dispute, but the Commission held that this contractual issue was outside its limited scope-of-negotiations jurisdiction. The Court agreed.

An Appellate Division panel has reversed *Mansfield Tp. Bd. of Ed. and Mansfield Tp. Ed. Ass'n*, P.E.R.C. No. 96-65, 22 *NJPER* 134 (¶27065 1996), App. Div. Dkt. No. A-4966-95T1 (3/17/97). The Commission restrained arbitration over a grievance contesting an increment withholding involving a third-grade teacher and held that the dispute should be decided by the Commissioner of Education. The employer gave two reasons for the withholding:

Your failure to timely communicate to, and your actions to withhold from, the resource room teacher and/or the child study team, your concerns regarding a classified student in your class, contrary to your acknowledged understanding as to your responsibilities in this area; and

Your failure to obey, and your actions to evade, an express administrative directive that all communications with a particular parent with whom the district was in ongoing multiple litigation, must take place in the presence of another district employee as witness.

Applying *N.J.S.A.* 34:13A-26 and 27, the Commission concluded that the withholding was predominately based on teaching performance reasons rather than disciplinary reasons. The Commission found that the first reason involved "an evaluation of teaching performance given a teacher's responsibility to cooperate with a child study team and other educators to develop the best educational plan for a special education student in her classroom" and that it might also involve the interpretation and application of special education statutes and regulations. The Commission found that the second reason accused the teacher of insubordination and was disciplinary in nature, but it also related to or arose out of litigation touching upon her responsibilities as a special

education teacher. The Appellate Division panel (Judges Skillman and Rodriguez) reversed, emphasizing that the withholding was based on a single incident of failing to communicate with the resource room teacher and child study team regarding her concerns about one student and that "the regular evaluation process of teaching performance was completely satisfactory, and it was only by virtue of something outside the parameters of the evaluation process that [the teacher] lost her increment."

On February 25, an Appellate Division panel (Judges D'Annunzio, Dreier and, Villanueva) heard oral argument in 11 consolidated discipline cases arising after *State of New Jersey v. State Troopers Fraternal Ass'n*, P.E.R.C. No. 91-117, 17 *NJPER* 340 (¶22152 1991), *aff'd* 260 *N.J. Super.* 270 (App. Div. 1992), *rev'd* 134 *N.J.* 393 (1993).

The consolidated cases are:

Union Cty. and PBA, Union Cty. Correction Officers, Local No. 199, Inc., P.E.R.C. No. 95-43, 21 *NJPER* 64 (¶26046 1995), app. pending App. Div. Dkt. No. A-3416-94T1

So. Brunswick Tp. and PBA Local 166, P.E.R.C. No. 95-45, 21 *NJPER* 67 (¶26048 1995), app. pending App. Div. Dkt. No. A-3418-94T1

Monmouth Cty. and CWA, P.E.R.C. No. 95-47, 21 *NJPER* 70 (¶26050 1995), app. pending App. Div. Dkt. No. A-3286-94T1

Hudson Cty. and District 1199J, P.E.R.C. No. 95-48, 21 *NJPER* 73 (¶26051 1995), app. pending App. Div. Dkt. No. A-3483-94T1

Hudson Cty. and PBA Local 51, P.E.R.C. No. 95-69, 21 *NJPER* 153 (¶26092 1995), app. pending App. Div. Dkt. No. A-4698-94T1

Woodbridge Tp. and IBT, P.E.R.C. No. 95-49, 21 *NJPER* 74 (¶26052 1995), app. pending App. Div. Dkt. No. A-3476-94T1

Woodbridge Tp. and AFSCME Local 3044, P.E.R.C. No. 95-50, 21 *NJPER* 75 (¶26053 1995), app. pending App. Div. Dkt. No. A-3477-94T1

Woodbridge Tp. and AFSCME Local 3044, P.E.R.C. No. 95-51, 21 *NJPER* 76 (¶26054 1995), app. pending App. Div. Dkt. No. A-3479-94T1

Woodbridge Tp. and AFSCME Local 3044, P.E.R.C. No. 95-52, 21 *NJPER* 77 (¶26055 1995), app. pending App. Div. Dkt. No. A-3478-94T1

City of Orange Tp. and FMBA Local No. 10, P.E.R.C. No. 95-53, 21 *NJPER* 78 (¶26056 1995), app. pending App. Div. Dkt. No. A-3480-94T1

Bor. of Hopatcong and PBA Local 149, P.E.R.C. No. 95-73, 21 *NJPER* 157 (¶26096 1995), recon. den. P.E.R.C. No. 96-1, 21 *NJPER* 269 (¶26173 1995), app. pending App. Div. Dkt. No. A-371-95T5

A key question in the argument was whether the recent amendment to section 5.3 described at pp. 8-9 of my annual report is retroactive.

Representation Cases

On March 18, the New Jersey Supreme Court heard oral argument in the *New Jersey Turnpike Authority* cases described at pp. 4-5 of my 1996 annual report.

Interest Arbitration

The Commission has adopted regulations specifying the standards for appointments and reappointments to its special panel of interest arbitrators. It has also adopted regulations specifying the procedures for considering whether to remove, suspend, or discipline interest arbitrators.

Grievance Arbitration Cases

An Appellate Division panel has reversed a trial court order confirming an arbitration award in CWA's favor. *State of New Jersey (OER) v. CWA*, 296 N.J. Super. 223 (App. Div. 1997), recon. den., pet. for certif. pending. The award and the lower court's opinion are discussed at p. 12 of my annual report. In an opinion authored by Judge Conley, the panel held that the contract did not authorize binding arbitration of a contractual dispute involving the discharge of an Assistant Deputy Public Defender.

Another Appellate Division panel has affirmed a trial court order confirming an arbitration award in favor of Rutgers. *Rutgers Council of AAUP Chapters v. Rutgers, The State Univ.*, App. Div. Dkt. No. A-5737-95T5 (2/19/97). An arbitrator held that the employer did not violate a clause stating that "a teaching assistant ... works normally at the maximum rate of fifteen clock hours per week" when it assigned 22 teaching assistants in the Department of English, New Brunswick to teach three courses. The arbitrator held that the clause set forth a guideline rather than a maximum. The Court held that this award did not violate public policy, was reasonably debatable, and involved the negotiable term and condition of employment of work hours.

Representational Rights

The New Jersey Supreme Court has affirmed the Appellate Division's decision in *International Union of Operating Engineers v. Delaware River and Bay Auth.* That opinion is described at p. 12 of my annual report. The Supreme Court's decision (Dkt.

No. A-9-96, issued 2/11/97) stresses the importance of the public policy favoring the right to negotiate.

Disciplinary Hearings

In *Drumm v. Township of Livingston Police Dept.*, App. Div. Dkt. No. A-5156-95T2 (2/24/97), the Court dismissed disciplinary charges that were not heard within a reasonable time of their filing. The employer waited for over a year and did not adequately explain its delay.

Overtime Compensation

The United States Supreme Court has held that public sector employees paid salaries may be exempt from overtime compensation under the Fair Labor Standards Act even if disciplinary fines or suspensions could result in paycheck deductions. *Auer v. Robbins*, __ U.S. __ (2/19/97). This decision may affect the decision on rehearing in the *Balgowan* case discussed at p. 15 of my annual report.

Tenure and Implied Contract Claims

The Supreme Court has reversed *Walsh v. State of New Jersey (Dept. of Public Advocate)*, 290 N.J. Super. 1 (App. Div. 1996), rev'd S.Ct. Dkt. No. A-93 (3/5/97), described in my annual report at pp. 15-16. The Court reversed substantially for the reasons stated in Judge Skillman's dissenting opinion below.

In *Falco v. Community Medical Center*, 296 N.J. Super. 298 (App. Div. 1997), an Appellate Division panel dismissed an employee's handbook claim given a disclaimer on the first page stating that the handbook was not a contract and a disclaimer in the

disciplinary guidelines stating that employment of every employee was subject to termination at the hospital's will. The guidelines had set forth comprehensive disciplinary procedures, including progressive discipline practices.

Privatization

In *CWA v. Whitman*, __ N.J. Super. __ (App. Div. 1997), an Appellate Division panel approved in part and reversed in part a lower court order dismissing a lawsuit concerning the reprivatization of motor vehicle agencies. The Court held that the Complaint failed to state a cause of action to the extent it alleged that reprivatization violated bidding requirements, Civil Service statutes, and constitutional guarantees of due process and equal protection. However, given two 1996 decisions of the United States Supreme Court extending First Amendment protection to independent contractors, the Court held that the plaintiffs could allege and seek to prove that their First Amendment rights had been violated when they were not appointed as motor vehicle agents.

Right-To-Know Cases

The Supreme Court has affirmed *Keddie v. Rutgers, The State Univ.*, 286 N.J. Super. 285 (App. Div. 1996), aff'd S.Ct. Dkt. No. A-34/35 (3/6/97), holding that the employer's legal bills in labor and employment cases are common law records obtainable by the majority representative. *Keddie* and similar cases are discussed at pp. 16-17 of my annual report.

Taxpayer Standing

An Appellate Division panel has held that a taxpayer lacks standing to seek to enforce a collective negotiations agreement allegedly requiring salary increases. *Loigman v. Middletown Tp.*, __ N.J. Super. __ (App. Div. 1997). The taxpayer had claimed that the employer was required to pay salary increases to police superior officers by virtue of a clause requiring a 12% salary differential between each rank and a recent interest arbitration award increasing the salaries of lower ranks. The Court, however, "remanded" the case to the Commission to determine (if a scope of negotiations petition is filed) whether the contract clause is an illegal parity clause or not.

Entire Controversy Doctrine

The Third Circuit Court of Appeals has affirmed the case discussed under this heading at pp. 18-19 of my annual report. *Kelly v. Bor. of Sayreville*, Dkt. No. 96-5342 (3/5/97). The Court's affirmance was based solely on the ground that the Complaint failed to state a cause of action. The panel majority (Judges Greenberg and Cowen) did not decide whether the lower court correctly ruled that the entire controversy doctrine also barred the lawsuit, but it did express "significant reservations" about that ruling. The third jurist (Judge McKee) rejected that ruling.